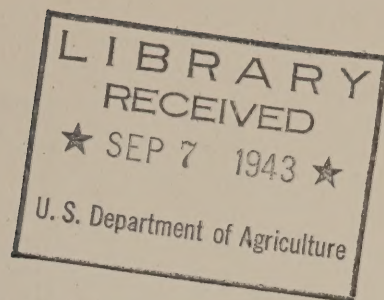


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OREGON STATE MILK CONTROL ACT

Paper No. 14. Series on State Milk Control Acts, Dairy
Section, Division of Marketing and Marketing Agreements,
United States Department of Agriculture.

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INTRODUCTION

This is the fourteenth of a series of papers designed to make available, in a condensed and convenient form, information concerning State milk control acts, the type of regulation issued thereunder, and, in general, the legal developments in connection with their administration and enforcement.

The series, to date, includes a paper on each of the following State controls: Indiana, Alabama, Connecticut, California, New Jersey, Virginia, New York, Pennsylvania, Rhode Island, Vermont, Massachusetts, and New Hampshire. Other papers are in process of preparation, there being at the present time some 20 States having milk control laws.

It is expected that a general summary of all the State acts and regulations will be prepared when the review of individual State acts and regulations is completed. In this connection some comparison may be made. These papers omit much detail which might be helpful to those concerned with legislative or administrative problems of State milk control. Those who desire more complete information will undoubtedly find it to their advantage to get in touch with the officials charged with the administration of these acts.

STATE MILK CONTROL IN OREGON
THE ACT, ITS ADMINISTRATION AND LEGAL STATUS

PART ONE

I. General Character of Legislation.

Permanent legislation 1/ authorizing public control of the fluid milk and cream industry, has been in effect in the State of Oregon since 1933.

In the preamble to the law it is declared, among other matters: that the production and distribution of milk 2/ is a paramount industry, that disparity between prices of milk and other commodities has diminished the producers' power to buy industrial products, broken down the orderly production and marketing of milk, and seriously impaired the agricultural assets supporting the credit structure of the State; further, that unfair, destructive (and other named) economic trade practices exist and weaken the dairy industry and the constant supply of pure, wholesome milk, and constitute a menace to the health and welfare of Oregon people; and, therefore, that to protect the well-being of the people and to promote the public welfare, the business of production, transportation, manufacture, storage, distribution, and sale of milk in the State is declared a business affecting the public health and interest and should be supervised and controlled in the manner provided in the statute.

Type of Governing Agency

The Milk Control Board consists of three members appointed by the Governor and removable by him at any time, and any vacancy shall be filled by his appointment. Each member shall be a resident of his respective Congressional District, of which there are three. The board therefore represents political subdivisions, not branches of the market (fluid) milk industry, due to the restriction that no milk

1/ This law is now known as Chapter XX, Title XLI, Oregon Code 1935 Supplement, as amended by chapters 67 and 69, Oregon Laws of 1935, special session, and by Chapter 197, Laws of 1939. The act of 1933 was approved December 9th of that year; the 1939 amendments were approved February 24th last.

2/ Milk, as defined, "means fluid milk and sweet cream sold for human consumption in fluid form."

dealer or producer, as these terms are defined in the act, 3/ may be a member; nor may any member have any financial interest or own stock "in any business or enterprise carrying on business as a milk dealer or producer." Members receive no salary, but a per diem of \$10 and actual and necessary expenses are allowed, subject to the requirement that per diem compensation of any member shall not exceed \$150 in any one calendar month.

Integration with the State Department of Agriculture is effected by the provision that the director of that department shall act as executive secretary of the board, although he may designate some member of his staff to act in his place and stead, and by the requirement that the department shall assist the board "in every convenient manner in the execution of the purposes" of the act. No compensation is allowed the executive secretary, who is required to exercise such powers as may be conferred and to perform such duties as may be imposed by the board.

Conditions Under Which Powers of Board May Be Exercised

Solely on its own motion and initiative the board is empowered to supervise, regulate and control the production and handling of milk as defined, and to the full extent provided in the statute.

Source of Financing

Activities of the board are financed by two separate kinds of license fee, the first, an annual fee of \$1, the second, a monthly poundage assessment, and each is required to be paid to the board by the milk dealers of the State, except that stores pay no poundage fee. Until the act was amended in 1935, the assessment was one-fourth cent on each pound of butterfat contained in milk received and handled by each dealer licensed by the board; the amount was then changed to one-half cent on each pound, and thus it continues under the present law.

Statutory Protective Provisions

Absent from this statute is the provision, often referred to as the interstate commerce saving clause, to the effect that nothing in the act shall apply or be construed to apply to foreign or interstate commerce, except as may be permitted by the Federal Constitution and the laws of the United States enacted pursuant thereto. Incorporated in the act, as amended in 1939 and until then not included, is another

3/ "Milk dealer" means any person who purchases or handles milk within the state for sale in this state, or sells milk within the state, except when consumed on the premises when sold. A producer who delivers milk only to a milk dealer shall not be deemed a milk dealer."

"Producer" means a person producing milk within the state of Oregon."

savings clause which provides that if any portion of the law be held unconstitutional, such decision shall not affect or impair the validity of the remaining portions of the act.

II. Regulatory Provisions.

Powers of the Board

Investigation.- The board is empowered to investigate "all matters pertaining to the production, manufacture, storage, transportation, distribution and sale of milk." In view of the limitation imposed by the definition of milk, authority to investigate similar phases of manufactured milk might be questioned. Further limitation is found in the requirement that power of the board to investigate shall be "with the Oregon State College." The college, however, is not referred to in connection with explicit powers of the board

(1) to implement any investigations through the issuance of subpoenas for the appearance of milk dealers or any person from whom information is desired, (2) to place witnesses under oath, 4/ (3) to examine into the "business, records and accounts" of any milk dealers and require them "to produce their records, books and accounts," 5/ and (4) to take depositions of witnesses within or outside the State.

Licensing powers.- Licensing of milk dealers is mandatory, except that in markets of 15,000 population or less the board has discretionary powers to license or not license. At the beginning of milk control, application for a license was required to be made within 30 days after the act took effect. Detailed information must be given by the applicant on blanks furnished by the board, including facts showing that he "has adequate personnel and facilities to properly conduct the business of handling, and selling milk," and that he "has complied with all rules, regulations and orders of the board." A license fee of \$1 must accompany the application.

The board may decline to grant a license, or may suspend or revoke one, upon "due notice and opportunity" to be heard, 6/ "when it appears" that the milk dealer in question (a) has failed to account and make payment, without reasonable cause, for milk bought from a producer; or (b) has committed any act injurious to the public health, welfare, or to trade or commerce in milk to such an extent as to obstruct the purposes of the act; or (c) has continued in a course of dealing of such nature as to satisfy the board of his inability or unwillingness properly to conduct the business of handling or selling milk or as to satisfy the board of an intent to deceive or defraud either producers or

4/ Subpoenas may be issued and oaths administered by any employee designated by the board.

5/ Power to enter premises, plants, etc., of producers and milk dealers and to examine books, records, accounts, etc., upon the premises where kept, is not explicitly accorded, but is inferable from an examination of the act as a whole.

6/ See "Hearings," below.

consumers; or (d) has failed either to keep records or to furnish the statements or information required by the board; or (e) has failed to pay the license fees or to obey any lawful subpoena, rule, regulation, or order of the board; or (f) has made any material statement upon which the license was issued that is or was false or misleading; or (g) has violated any provisions of the milk control act.

The board is authorized to classify licenses; for example, it may issue licenses to dealers to store or manufacture or sell milk in a specified market but not elsewhere. Licenses are in addition to any other license required by existing State laws or municipal ordinances.

Records and reports.- Each licensee, other than a store, is required to keep records and make reports as will enable the board to compute the payment of his applicable license fee of one-half cent on each pound of butterfat contained in the milk he receives and handles. In addition, all licensees must keep adequate books and records showing "(a) all milk received, with butterfat content, prices paid, deductions or charges made, the name and address of each person from whom milk was received; (b) all milk sold, classified as to grade, the prices and amounts received therefor and the market outlet and size and style of container; (c) the quantity of each milk product manufactured and quantity of milk used in the manufacture thereof; (d) all wastage or loss of milk or butterfat; (e) the items of the spread or handling expense and profit or loss represented by the difference between the prices paid and the prices received for all milk; and (f) such other records and information as the board may deem necessary for the proper enforcement of this act."

Bonding not required.- Bonding of milk dealers, to insure payments to producers for milk purchased, is not required by the act.

Cooperation with other authorities.- Declared to be an "instrumentality of the State," the board is empowered to confer, cooperate, and enter into compacts with the legally constituted authorities of other States and of the United States, "with a view to securing a uniform system of milk control" with respect to milk entering or leaving the State, and to coordinate its activities and powers with those of said authorities with a view to accomplishing the purposes of the act.

Mediation and arbitration.- Power is granted to mediate or arbitrate any controversial issue that may arise among or between producers and dealers, whether as individuals or as groups.

Powers in Regard to Price Regulation

Prices to be charged by producers and by milk dealers.- Price fixing of the producer's milk and of milk sold at retail or wholesale is mandatory, but before prices are fixed the board must ascertain (1) what prices for milk "in each locality and market area" of the State

"will best protect the milk industry and insure a sufficient quantity of pure and wholesome milk in the public interest", and (2) "shall take into consideration all conditions affecting the milk industry, including the price necessary to produce a reasonable return to the producer and to the milk dealer." By amendment in 1939, the act further provides that the board shall take into consideration costs of production and distribution and the market conditions in the particular sales and production area to be affected by an order applying to such area. Thereafter the board, after due notice and public hearing,^{7/} must, by order, fix the minimum wholesale and retail prices to be charged for milk handled and sold within the State for human consumption in fluid form, including the following classes: "(a) by producers or associations of producers to milk dealers; (b) by milk dealers to stores for consumption on the premises, or for resale to consumers or to others; (c) by stores to consumers or to others except for consumption on the premises where sold; (d) by producer-distributor and distributor for deliveries to homes of consumers." It is left to the board to decide "upon facts found by it," as to any differences that may exist in the cost of various services and whether there shall be established differentials in prices between house-to-house sales by dealers, house-to-house deliveries by stores, and sales on credit and over-the-counter sales by stores for cash.^{8/}

Where various grades of milk are specified by any other statute, regulation thereunder, or municipal ordinance, the board shall fix the price applicable to each grade. Pricing orders may vary in different markets, and each shall designate the market to which it is applicable. In addition, an amendment to the act in 1939 provides that in those sales areas or production areas supplying the same, where the dealers do not have adequate facilities for the blending or standardizing of whole milk sold in the form of whole milk and where blending or standardizing is not required by State law or ordinance in the city or town in the sales area, the prices for milk sold in the form of whole milk shall not be graduated according to butterfat content.

Either on its own motion or on application, the board is empowered, as occasion requires and after public hearing, to alter, revise or amend any order theretofore made in respect of prices to be charged or paid for milk, "designating and defining the limits of markets, milksheds, or upon any other matter within the jurisdiction of the board."

Method of payment to producers; "basic averages," pooling.-
As noted above, the board is required to fix minimum prices applicable to various grades of milk, if by statute or ordinance such grades are specified. Such terms as "method or manner of payment," "payment according to use" (class use) are not contained in the act. The act

^{7/} See "Hearings," below.

^{8/} See "Administrative Procedure," Part Two, page 12, paragraph 3.

very definitely, however, lays the basis of settlement with producers either through market-wide pooling or the individual dealer pool and, in either case, base rating may accompany such pooling.^{9/} The fact, moreover, that milk, as defined, means fluid milk and sweet cream sold for human consumption in fluid form implicitly provides a basis for class-use pricing, that is, one price for "milk," and another price for the surplus thereof. In addition, the act (Sec. 41-2013) stressing the effect of surplus milk in certain markets, declares that such surplus must be sold "for factory or other purposes at prices usually lower than would be received if sold in the fluid milk trade."

Hearings.- The act provides that the board shall hold a public hearing prior to the making, revising or amending of any of its orders, including orders with respect to prices to be charged or paid for milk, the pooling of milk, the allocation of quotas, and orders designating and defining the limits of markets and milksheds. While the term "public hearing" is not used in the statute, its equivalent is contained in the provision that notice shall be given to "interested parties and the public generally of the time and place ^{10/} of the hearing." Provision that "due notice" of hearing be afforded lies in the requirement that the notice be published "in such newspaper or newspapers as in the judgment of the board shall afford reasonable notice and publicity."

By amendment in 1939, specific limit as to timing of notice is provided before the board may issue an order denying an application for a dealer's license or revoking such license. In such case, notice shall be in writing and be served either personally or by mail at least

^{9/} The wording of Section 41-2013 authorizing market-wide pooling, also base rating, is, in part, as follows:

"It is recognized. . . that to stabilize and promote the milk industry it is necessary that uniform prices be paid to all producers who. . . furnish milk to any specified market. . . ." [Therefore,] the board shall have power: (a) to define and limit the area where milk shall be produced for any given market; (b) to determine under uniform rules and regulations, "what proportion of the milk produced by each producer shall be considered as marketed as fluid milk for human consumption and what proportion so produced shall be considered as surplus; and (c) to provide for the pooling and averaging of all returns from the sales of fluid milk. . . , and the payment to all producers of a uniform pool price for all milk so produced, subject to such equitable adjustments as shall be made by the board and subject to such rules and regulations as may be imposed for the control of surplus production by the establishment of basic averages or other methods."

^{10/} Prior to amendment of the act in 1939, there was no provision as to where such hearing should be held. The law now provides that a separate order shall be made for each sales and production area and each such order shall be preceded by a hearing "held within the particular sales areas to be affected by the order."

five days in advance of the time set for hearing. In addition, the hearing shall be held at some convenient place in the county of the person affected, unless he waive such privilege.

New subject matter with respect to hearings, in addition to that indicated above, was added by the act as amended in 1939, and provides that any hearing may be conducted, in the absence of the board, by an accredited examiner who may be a member of the board. Such examiner, if conducting a hearing, shall make, or cause to be made, a record of the evidence and proceedings on such hearings, and certify the same to the board for its subsequent action.11/

Unfair Methods of Competition and Unfair Practices

It is implicit in the law that the board shall have power to seek to prevent unfair methods of competition and unfair trade practices. The legislative declaration recites the present existence of "unhealthy, unfair, unjust, destructive, and demoralizing trade practices" within the dairy industry as constituting "a menace to the health and welfare of the inhabitants of the state," giving this situation as one of the several reasons for the enactment of the statute in the public interest. In addition, the act declares unlawful "any method, device or transaction whereby any person buys or offers to buy, sells or offers to sell [milk] at a price less than that fixed by order of the board applicable to the grade of milk involved in the transaction occurred, whether by discount, rebate, free service, advertising allowance, gift or otherwise."

Limitations and Exceptions

Certain limitations placed upon the power of the board to regulate and control the production and handling of milk are implicit in such definitions as "milk," "producer" and "market." For example, the definition of milk precludes the power to fix the price of factory milk; a producer means "a person producing milk within the state of Oregon," so, apparently, limitation lies in this quarter, aside from any limitation invocable through Federal interest in the control of interstate regulation of milk; the 1939 definition of "market," together with section 41-2009 as amended in 1939, denies the right of the board, formerly exercised, to issue State-wide orders with respect to prices, pooling and producer quotas, and requires that each market area and production area supplying such market area, shall include only that territory in which conditions involved in the production, processing, and distribution of milk are similar. Explicit is the provision that the act shall not be construed to conflict with or repeal any State or municipal law or ordinance relating, among other matters, to health and sanitation and to the inspection and grading of milk.

11/ The examiner is given power to swear and examine witnesses, take testimony and otherwise conduct the proceedings to the same extent as the board is empowered to conduct them.

Exceptions in the law include the provision that a producer, who is also a milk dealer but is producing and selling milk from only one cow, shall not be required to pay annual license fee of \$1, nor the poundage fee required of all other milk dealers except stores, and that producers, producer-distributors, or their successors shipping to any market, at the time of the effective date of the act in 1933, may continue to ship to such market until they voluntarily discontinue such shipping. Previously noted is the provision with respect to possible exemption from licensing requirements in markets of 15,000 population or less. In addition, a preferred status given to certain cooperatives as indicated below, constitutes a further exception granted by the act.

Violation

Unlawful acts.- It is declared unlawful for a milk dealer to buy from or sell milk to another milk dealer who is not licensed, nor may any dealer buy milk from producers or others for sale within the State, or sell or distribute milk within the State, unless he be duly licensed. It is also unlawful for any dealer to deal in or handle milk if he "has reason to believe" it has previously been dealt in or handled in violation of the terms and provisions of the act. After the board shall have fixed the prices to be paid the producer or his association and the prices to be charged at resale, it shall be unlawful to buy or offer to buy, sell or offer to sell, any milk "at prices other than the prices fixed by order of the board." In addition, the granting of rebates, etc., as indicated in a preceding paragraph, is declared an unlawful act. Finally, it constitutes a misdemeanor for any person failing or refusing to comply with any subpoena issued by the board or pursuant to its authority or any rule, regulation or order of the board.

Penalties.- Fine of not less than \$25 nor more than \$1,000, or jail sentence of not less than 30 days nor more than 90 days, or both fine and imprisonment, are the penalties provided, upon conviction, for violating any provision of the act, and such violation constitutes a misdemeanor. Justice courts and district courts are given concurrent jurisdiction with circuit courts of all criminal offenses provided for in the act. Failure or refusal to comply with any subpoena issued by the board or pursuant to its authority, or to comply with any rule, regulation or order of the board is punishable as a misdemeanor by a fine not exceeding \$100 or by jail sentence of not over 90 days, or both, and each day during which violation shall continue constitutes a separate offense. In the event of such noncompliance, it becomes the duty of the circuit court of any county, or judge thereof, upon application of the board, to compel obedience by attachment proceedings for contempt as in the case of contempt where the court's subpoena, order, or decree is disobeyed or where there is refusal to testify before the court. A further deterrent in the nature of penalty, lies in the power of the board, under conditions as stated, to deny application for a license and to revoke one already granted.

Legal Remedies

Board.- As just indicated, the legal remedy available for securing compliance with the law or orders issued thereunder consists in proceedings in the circuit court, and it is the duty of such court "to compel obedience by attachment proceedings." This direct method of securing compliance is "in addition to the provisions. . . defining what shall constitute a misdemeanor and prescribing the punishment therefor."

Aggrieved persons.- The act has no specific provision in respect of the legal remedies available to any person aggrieved by an action of the board, except in the matter of an order refusing to issue a license or suspending or revoking one. In such case the board's order "may be reviewed upon writ of review by the circuit court. . . for the county in which the applicant has his place of business." It has been pointed out, under "Hearings," that an applicant or licensee shall be given 5-days' notice and opportunity to be heard before the board may issue final order. It is not to be inferred, however, that absence of specific provision in the law, other than as regards license, is to deny the right to appeal to circuit or State supreme court in an action to enjoin enforcement of the provisions of the act. As is shown under "Legal Status," Part Three, suits have been brought against the board, though unsuccessfully, on the ground that the act is unconstitutional, void, and lacking legal sanction.

Status of Cooperative Associations of Producers

A cooperative corporation or association organized under the Oregon State laws that is engaged in marketing or making collective sales of milk produced by its members is granted certain privileges. These consist in the provision that nothing in the act shall be deemed or construed to prevent or abridge the right of such cooperative from blending the net proceeds of all its sales in various classes and paying its producers such blended price, with such deductions therefrom and/or differentials as may be authorized under contracts between it and its members, or from making collective sales of both members and/or other producers represented by or marketing through it at a blended price based upon sales thereof in the various classes "and markets," or to prevent or abridge the right of any milk dealer from contracting for his milk with such cooperative upon such basis, or to impair or affect any contracts which any such cooperative has with milk dealers or others, or affect or abridge the rights and powers of any such cooperative conferred by the laws under which it is incorporated. The above, however, is subject to the proviso "that the prices to be paid for milk marketed by or through any such [cooperative] corporation shall be those fixed by the order of the board."

PART TWO

I. Administrative Procedure, Rules, Regulations and Orders.

Extent of authority exercised in State.- Following approval of the milk control law by the Governor on December 9, 1933, and appointment by him of the three-man board, exercised by that body of its powers and duties was promptly put into execution. On December 23, Official Order No. 1 12/ was issued, and followed, within 4 months, by some 40 orders, applicable to some or all of the cities, towns and villages in approximately two-thirds of the 36 counties of the State.13/ By the end of 1934, 90 orders had been issued applicable in whole or in part to 33 counties, and by June 1, 1939, a total of 121 orders had been issued, many of these repealing or amending earlier orders 14/ but firmly establishing throughout the State, with the possible exception of three counties, the licensing of milk dealers and the fixing of prices for producers and at resale.

12/ Viz., establishing for the city of Salem a price of \$2.10 per hundredweight based on 4 percent butterfat test and resale prices to stores, cash and counter sales, doorstep delivery (cash in advance), and charge account of 8-1/2 cents, 10 cents, 10 cents, and 11 cents per quart, respectively.

13/ Some of these orders were merely pricing orders, as in the case of No. 1 above; others included prohibitions of certain practices, provision for charging an additional cent a quart where a cap other than the standard flat disc cap was used, and for a bottle deposit of 5 cents at wholesale stops. In the case of the Portland market, orders No. 3, 5, 8, and 16 set forth such matters as prices and trade practices and the limits of milkshed and market area, and in orders No. 17 and No. 29, pooling on a market-wide basis and a system of production control got under way in the Portland sales and production areas.

14/ Order No. 108, effective July 1, 1936, repealed at least 54 previously issued orders and in their stead established "uniform minimum prices for fluid milk and cream for human consumption in the State of Oregon." This State-wide pricing order was in turn repealed by Order No. 118, effective May 1, 1938, which likewise established State-wide pricing and denied the right of any producer, "whose milk and cream was being sold in the milk markets of the State of Oregon December 15, 1933, or within a period of sixty days prior thereto, or who has since become a producer on any market by permission of the Order of this Board," without the board's consent and a showing of "just cause and necessity," "to have any portion of his milk and cream diverted for sale purposes from the community, town or city being served by said producer to any other community, town or city within the State of Oregon."

As a result of the 1939 amendment requiring a public hearing and issuance of a separate order for each market area, the work of the board presumably will be increased and made more expensive than formerly under a program based in part on the issuance of State-wide pricing orders. (See footnote 14.)

Persons controlled or affected.- Under the Oregon Milk Control Act, as put into effect and enforced by the board, both producer and dealer have been brought under rigid supervision and control. The dealer, including store, distributor, and producer-distributor,^{15/} must be licensed and conform to the strict requirements of the law, as well as specific orders of the board. Both producer and resale prices have been established throughout the State and a State-wide order prohibits the giving of rebates and other specified practices. In the marketing areas where base rating and pooling are established, control appears to have taken on some of the features of public utility regulation.^{16/} Especially restrictive is the provision in the order (see footnote 14) which substantially ties the producer to a given market outlet and applies similarly to the milk distributor.^{17/}

^{15/} Under section 13 of the 1933 act, the producer-distributor was excepted from the pooling, base-rating, expense and several other features of the law, if and when producing what is known, under ordinances in various cities of the State, as "Grade A raw milk," bottling such milk on the premises where produced and selling only to his "bottled milk trade," including stores or other dealers whose requirements called for this type of milk for their bottled milk customers. Following a court decision which held the exemption invalid (q.v. Part Three) it was stricken from the act in 1935.

^{16/} The board regards its regulation in such way, as is indicated in various addresses by board members; for example, the chairman of the board in a printed address delivered in Portland on December 30, 1938, said in part: "They [opponents of milk control] object to market milk being considered a public utility, apparently losing sight of the fact that. . .in the interest of public health the public must regulate its production. . . ."

^{17/} This order (No. 118) states that no licensee "shall be permitted, without the consent of the Board first being obtained, and without showing just cause and necessity, to divert or change serving the markets now being served by such distributor to any other market in the State of Oregon."

Classification for purpose of price determination.- From the standpoint of producers, only milk, as defined, is priced by order of the board. The board does not set prices to be paid for milk and cream used in making ice cream, butter, cheese, condensed milk, or other manufactured products. By Order No. 118, effective May 1, 1938, the minimum prices to be paid producers and producers' organizations "for all milk and cream for use in the bottle and can trade" were fixed at 53, 55, and 58 cents "per pound butterfat content, f.o.b. market." Of these prices, the highest applied to markets where basic quotas have been established by order of the board or where market pools are operated with the board's approval; the 55-cent price applied in any market where the board had not by order established basic quotas but had permitted the distributor to do so; the 53-cent price applied in markets other than the two kinds just mentioned and where the distributor buys the entire production of his producers and shippers.

At resale, under Order No. 118 for example, minimum prices obtain for 1/2 pints, pints, quarts, and gallon lots in cans, at wholesale and retail and as regards 4 percent milk and 5 percent milk. Light cream (18-22 percent) and heavy cream (30-33 percent) are also priced under the same size category. Bulgarian buttermilk "with butterfat" is priced the same as 5 percent milk, and chocolate milk the same as 4 percent milk. In the case of milk in excess of 4 percent butterfat, an increase is provided, for each excess point, of 1 cent on all quarts and pints and 1/2 cent on all 1/2 pints and 10-ounce units. Ten-ounce units are 1/2 cent higher than 8-ounce units, and milk sold to school cafeterias may be priced 1/2 cent below the usual price. As regards special milk such as "Grade A" bottled, the purchasing distributor must pay the producer-distributor a price 1-1/2 cents a quart below the wholesale price established in the market for such grade of milk.

No cash-and-carry store differential has been permitted by the board since 1935.

Method of payment; base rating; market-wide pooling.- A system of base rating and market-wide pooling, initiated as to Portland in the earliest stages of milk control, has been established and is in operation in the marketing areas of Portland and Eugene.^{18/} In the Corvallis area a system of market-wide pooling, without base rating, is in effect. These features are by direct order of the board; elsewhere a rating system may become effective through the establishment by the dealer of "dealer's quotas," if approved by the board.

Under the statute (see footnote 9 above) and the board's administrative interpretation thereof, base rating is used frankly as a means of controlling production as an instrument of price maintenance. It is a

^{18/} Because of court litigation, the base rating and market-wide pooling provisions applicable to the Salem marketing area are at present not being enforced by the board.

plan under which each producer is assigned a quota based on his share of the market as determined by previous performance, and is expected to produce no more than the quantity he has averaged during the 8 or 9 low-producing months of some previous year. This quantity, in terms of pounds of butterfat, is known as his "production quota or basic average." Milk delivered against this quota is paid for at the "basic rate" fixed (previously and by separate order) by the board, while any quantity produced above this quota brings what is termed the "surplus price." This price, unlike the "basic price," is not fixed in a definite amount but, in the wording of Orders Nos. 119, 121, and 131 re Salem, Portland, and Eugene, respectively, is fixed "at such times and by such methods as it [the board] may deem reasonable." A quota is subject to adjustment downward each year in the event that the producer's four lowest months of production fall below his allotted quota; in such case the owner may lose a part of his quota, which part becomes "lapsed quota" and reverts to the board, whereupon it becomes available for redistribution to old producers qualified for an increase in quota and/or (under rules issued in 1939) to properly qualified new producers.

Under current regulations new producers have available a new method of securing the preferred status of an old producer. Prior to 1939 a new producer received only the "surplus" price for his milk; to qualify as a recipient of the "basic pool" price he was obliged to buy or otherwise acquire the requisite quota from one or more qualified old producers. While bona fide purchase or lease of quota (under conditions indicated below) is still the shortest route to arrival at the status of the regular producer, it is no longer the only route. The alternative course is as follows: The new producer makes application to become a regular producer; he must show compliance with the necessary sanitary requirements in the production of his milk; then, for a period of not less than six months prior to June 1 of any year, he must produce and deliver this qualified milk to the market (Portland or Eugene). For this milk he will receive only the surplus price. Then on June 1 of the following year he will be allocated his proportionate share of lapsed quota available for distribution to new producers. How much lapsed quota will be available for distribution to new applicants cannot be determined until June 1, each year.^{19/}

Until 1939, quotas were treated as tangible property to be bought, sold, rented, or leased. Producers, as well as cow dealers, traded in quotas for direct or indirect profit. At times cows, with

^{19/} Both the current Portland and Eugene orders further provide "that any increase of quotas to old producers and any allocation of quotas to new producers shall be made only if there is available either lapsed quota or if the sales in the bottle and can trade of said producers on the market have substantially increased. If there is neither lapsed quota nor increased sales, there shall be no allocation or increases of quotas to the respective producers on the market."

a pound or two of quota included, were sold at very high prices; sometimes quota was sold merely as quota at high prices. One practice was for the producer who was producing below his quota to locate some producer who was exceeding his quota, and by sale, lease, rent, or loan, to secure the quota desired; later, when the quota thus acquired was no longer needed, it was returned to the original owner by a prearranged method or was otherwise disposed of. These practices were stopped with the issuance of Orders No. 121, June 1, 1939, and No. 131, November 11, 1939, for the Portland and Eugene marketing areas respectively. By these orders a quota has become a part of a production unit which, in turn, includes the dairy farm, dairy herd, and dairy equipment, and there can be no transfer of quota from one person to another except by sale or lease of farm, herd, and equipment.^{20/} In addition, application for such transfer must be made to the board, supported by sworn copies of leases, bills of sale, or partnership agreements, so that the board can determine as to the legitimacy of the transfer and as to compliance with its rules in respect of quota transfers.

With respect to the pooling of milk, the board's orders operate to yield to each qualified producer^{21/} the basic pool price for all milk sold by him up to the amount of his quota and regardless of whether such milk is actually sold as fluid milk at the minimum price or in

^{20/} The foregoing statement is qualified to the extent that there are other regulations pertaining to partnerships and estates of deceased producers. Section 3 of Order No. 121 gives in detail the manner in which transfer of quotas may be made.

^{21/} Under the act of 1933, Grade "A" producer-distributors were excepted from the pooling and rating provisions of the act, but following an adverse court decision in respect of such exception, the law in this respect was amended and thereafter producer-distributors became subject to these features of the law. In the Portland market, when the surplus within the basic pool exceeds by 5 percent or more all delivered quotas on the market, this group is required to make equalization payments up to 5 percent of such surplus and no more. In the Eugene market the producer-distributor's quota is his sales of fluid milk and fluid cream in the bottle and can trade from milk of his own production and it therefore varies from month to month; but he also helps to carry a 5 percent surplus for the market and pays equalization thereon. Any surplus above 5 percent is carried by the Grade "B" producers.

manufacturing channels at lower prices. The orders also provide that the proceeds of all milk sold in excess of his quota shall be credited into the surplus pool (regardless of the price at which it may be sold); and that after deducting the board's expense the average price received for surplus milk shall be distributed to producers in accordance with the quantity of their respective surplus sales. Incident to market-wide pooling under the board's orders is the fact that a producer may not receive the full minimum price for his entire quota, even though he may have sold it all as fluid milk for the minimum price, because of the inability of other producers to sell the entire amount of their quotas for human consumption. The basic price is thus reduced and in the equalization process those who have received the full minimum price must of necessity remit a portion of their receipts in order that the returns may be uniform to all.

Trade practices.- Pursuant to the provision of the law declaring unlawful the granting of discounts, rebates, etc., the board almost at once inserted in its official orders certain prohibitions in the nature of unfair trade practices.^{22/} On October 10, 1934, there became effective Order No. 72, which amplified greatly prior provisions dealing with unfair practices in Multnomah County, wherein the Portland market area is situated. This order was followed by Order No. 82, effective October 30, 1934, which provided that the provisions of Order No. 72 be extended to and apply to the milk industry throughout the State. These orders have remained and are in effect. Among the acts "considered unfair practice" are the giving of samples, special inducements, premiums, and discounts; the giving, loaning, selling, or furnishing of ice boxes, ice, etc., to a dealer in order to get or retain his business; and the offering of prizes to customers or prospective customers for contests or otherwise. In addition, definitions, restrictions and/or prohibitions are issued with respect to such matters as advertising, cut rate offers, soliciting, visitations of plants, scrip books, deliveries, trademarks, new employees, commercial bribery, misrepresentation, and solicitors. Also considered an unfair practice is failure of a distributor, dealer, store, or other person handling or selling milk to charge 5 cents for quart bottles and 3 cents for half-pint or 10-ounce bottles; nor may any distributor pick up, use, or have in his possession any can or case, the title of which is vested in another person.^{23/}

^{22/} Order No. 3, effective January 9, 1934, for example, contains this: "No cash discounts, rebates, unusual extensions of credit, gratuities or free service of any nature shall in any way enter into the sale or purchase of milk or cream in Multnomah County under this act."

^{23/} In this official order the dealer's attention is directed to that provision of the law which provides that a dealer's license may be revoked "where a milk dealer has continued in a course of dealing of such nature as to satisfy the Board of his inability or unwillingness properly to conduct the business of handling or selling milk."

Records and reports.- A minimal requirement of the board is that every milk dealer or distributor shall keep and maintain records to be furnished to the board upon its demand, showing the daily amount of fluid milk and cream purchased and used in the "bottle and can trade" and in the surplus channels, and the amount of fluid milk and cream actually bottled. In the markets where all milk is accounted for in the master ("basic") pool and in the surplus pool, pool agents^{24/} are required to keep various records and accounts for pool accounting purposes and shall furnish, at such times as the board may require, statements in respect of pooling operations. Pool agents also must file and keep filed with the board accurate production and quota records. As regards distributors and producer-distributors, each is required to furnish shortly after the end of each pooling period a statement on blanks in form approved by the board, showing, for the pooling period immediately preceding, all facts and information which in the judgment of the board may be necessary for accounting and pooling purposes.

In addition to the above type of record-keeping and reporting, the board requires from the distributor a confidential, sworn report of profit and loss and balance sheet, showing, among other things, sales and purchases in all classes of milk and milk products, processing, manufacturing, delivery, selling and general and administrative expenses, net operating profit or loss, and other net income, together with assets (current, fixed, investments, deferred charges, etc.) and liabilities.

PART THREE

Legal Status

Litigation.- The control program set up and administered by the Oregon Milk Control Board has, considering its nature and wide-spread application throughout the State, been attended with considerable success and, until recent months at least,^{25/} the board has encountered no unusual or serious difficulties in securing compliance with routine orders. The constitutionality of the act, upheld in all its salient features in four separate actions in circuit courts, was on June 6, 1939, sustained by the Supreme Court of the State. These decisions, briefly considered, are as follows:

^{24/} Producers desiring to market milk and/or cream collectively through a pool agent may do so and be paid through such agent, provided they have designated him with such authority and written proof thereof has been filed with the board.

^{25/} Some months ago opponents of the act began an initiative movement for repeal of the law; even though unsuccessful such action might possibly encourage, for the time being, more than normal opposition to the milk control program.

Meyer et al. v. Board and Brandes Creamery, Inc. - ^{26/} This action was brought by four producers of Grade B milk and cream selling same to the Brandes corporation, which in turn pasteurized and sold their product for human consumption, or its surplus otherwise, within the Portland sales area. The suit sought to enjoin, on constitutional grounds, the enforcement of the pooling provisions of section 13 of the act of 1933, as administered under Orders No. 78 and No. 100.^{27/} Constitutionality of minimum price fixing was not challenged. Particularly at issue was an equalization charge against defendant Brandes in the sum of \$643.43, deducted from the returns to plaintiffs and assessed for the benefit of those producers in the pool who were unable to sell their full quotas in the bottle and can trade.

The court strongly upheld the main provisions of the act, including the licensing of dealers, price fixing of milk, and market-wide pooling; but, as regards one feature of the 1933 act, found constitutional weakness, viz., the exemption of producer-distributors from the operations of pooling, base rating, and otherwise. Exclusion of this group, with their high bottle and can outlet, necessarily entailed higher equalization levies upon certain distributors within the pool (including Brandes) than otherwise would have been the case. Therefore, the court held that section 13, before the amendment of 1935 became effective (November 15, 1935), was unenforceable and void and ordered that the money paid into court by Brandes prior to that time under order of the court must be refunded.

In addition, the court upheld certain provisions of the act in respect of producer-cooperatives, pointing out that such privileges as were accorded thereunder as to blending net proceeds of all sales, etc., did not relieve the cooperatives from any of the burdens imposed by section 13.^{28/}

One other feature of the act, as interpreted by the board in Order No. 100, the court objected to, namely, the provision of section 13 empowering the board to set up agencies (marketing agents) for the handling and disposal of the surplus fluid milk. "It would be a proposition of doubtful validity," said the court, "that the State;

^{26/} In the circuit court, Multnomah County, before Judge Hall S. Lusk; decision February 8, 1936.

^{27/} Effective October 1, 1934, and August 1, 1935, respectively.

^{28/} "The issue made," said the court, "that the Board has actually discriminated in favor of the Dairy Co-operative Association. . . need not be considered, in view of the holding that Section 13 was invalid while the alleged unfair practices were carried on, and of the fact that the methods complained of by the plaintiffs have been abandoned."

through its Board and agents appointed by it, could, against the will of the individual, take over the actual handling of sales of his product. That has never been attempted, so far as I am aware, even in the case of public utilities as long as the utilities are permitted to remain in private ownership." The court thereupon enjoined the enforcement of the order and held that the clause in question in section 13 should be construed as operative only where the producers desire the services of marketing agents.

Sweeney and Kennedy v. Board.- 29/ Plaintiffs in this suit were milk consumers in the city of Portland, seeking to have Order No. 109 declared void and its enforcement enjoined. In the complaint it was alleged, among other things, that the order increased, unnecessarily, the retail price of milk from prices obtaining under Order No. 108 but that if there were scarcity of fluid milk it was due to "unreasonable and arbitrary orders" with respect to the circumstances under which milk could be produced for and sold in the Portland market; "that the Portland milk shed includes the southwestern part of the state of Washington,30/ and that the activities of the defendants in promulgating said order No. 108 and its proposed order No. 109 have had the effect of and will continue to have the effect of unreasonably restricting and hampering the free flow of commerce between the states of Oregon and Washington."

Decision of the court hinged on the fact that plaintiffs did not question the constitutionality of the statute and that their counsel told the court: "The only thing I am attacking in this complaint and in this suit is order No. 109 and counsel knows it." Although from the early beginnings of milk control the board had issued orders 31/ defining the milk production shed or "present producers" in a way to include certain qualified Washington producers selling inspected milk in Portland, and in various orders 32/ included these producers under pooling and/or quota regulations applicable to the Oregon producers selling in the market, the court decided these matters as extraneous in the instant suit. As to this phase the court said: "Since the only order here in question and under

29/ In the circuit court, Multnomah County, before Judge Louis P. Hewitt; decision November 6, 1936.

30/ The chairman of the board in the fall of 1938 stated that approximately one-fourth the producers supplying inspected milk to Portland consumers are in the State of Washington and are subject to the quota and pooling provisions of the Oregon act.

31/ Orders No. 3 (1/9/34) and No. 16 (2/20/34), among others.

32/ Orders No. 17 (2/21/34); No. 29 (3/14/34); No. 78 (10/1/34); No. 100 (8/1/35); No. 105 (3/1/36).

attack is Order No. 109, exclusively a price-fixing order, the previous orders not being questioned in this case, the court is bound to take them as entirely valid." The judge pointed out that Order No. 109 "in no way deals or attempts to deal with the movement of milk between states" and "contains no provision with regard to any geographical area from which milk shall be produced for any market. That matter is regulated by entirely different orders or regulations of the Board, not in question in this case."

The court, considering only Order No. 109, refused to pass upon questions as to poundage assessment, pooling expenses, exclusion of producers from the Portland market if their farms were located more than 33 miles from Portland, and monopoly. The effect of the increased resale prices of milk, the court held, would decrease consumption, increase production and produce a surplus, "a necessary precaution [in the judgment of the board] in order to insure a sufficient quantity of pure and wholesome milk." As to the adequacy of investigation by the board, hearings and submission of testimony, and method of estimating distributors' average costs, prior to the fixing of resale prices, the court found no objection; and the suit was dismissed.

Board v. Oldenberg.-^{33/} This suit was brought against a producer-distributor to enjoin him from selling milk in the Salem market unless he obtained a license and refrained from selling his milk at prices below those fixed by the board. In addition to his failure as to license and selling, he had refused to pay the monthly poundage assessment and to keep records of his milk business. His demurrer was that the milk statute and the board's orders violated certain provisions of the State and the Federal constitutions. The court held, among other things, that the act was not violative of the due process clause of the Fourteenth Amendment of the Federal Constitution, citing the *Nebbia* case (291 U.S. 502) and *Borden's Farm Products Company* case (293 U.S. 194) as authority. Similarity of disturbing conditions in the milk industry in Oregon and in New York was pointed out and the fact that the one was permanent law and the latter an emergency statute, was held immaterial by the court; nor could the judge find in the law an unlawful delegation of legislative power. Therefore, as against all of defendant's objections as to the validity of the law as presented by the demurrer, the court concluded that the law was a valid exercise of legislative power and should be upheld.

Savage and Fox v. State.- ^{34/} Plaintiffs as producer-distributors of Grade A raw milk on behalf of themselves and 19 other producer-

^{33/} In the circuit court, Marion County, before Judge L. G. Lewelling.

^{34/} In the circuit court, Marion County, before Judge L. G. Lewelling; decision May 16, 1938.

distributors sought to enjoin the board from enforcing Order No. 107, especially its pooling and "production quotas" for all producers on the Salem market, and also its provision for payments to equalize the return received by all such producers. The board's order was attacked solely on constitutional grounds, no fault having been found with the mechanics of the pool, but rather that the promulgation of the order was void because it violated certain constitutional rights. The court, on authority of its decision in the Oldenberg case, held, first, there was no unlawful delegation of power by the statute; second, that no disparity existed, so far as cost of production and sanitary requirements were concerned, between "Grade A" and "Grade B" milk; third, that the "pool and basic price afford a mutual protection to all producers in the area, and obtains a stabilized market for their product," and that plaintiffs "ought not to complain about the burdens they are required to bear when the benefit redounds to the entire class of producers as a whole;" and, fourth, that the board had not acted in an "unconfined, unrestricted, and vagrant" manner, but only upon reasoned judgment, based on ascertained facts as contemplated by the statutes. Decree was against plaintiffs and for the board.

Savage and Fox v. State.- ^{35/} This was an appeal from Judge Lewelling's decision dismissing plaintiff's suit to enjoin the enforcement of Order No. 107. Again unconstitutionality of the statute was alleged. First, as to the power of the legislature to enact the statute, the court's basis for such authority was found in the Nebbia decision of the U. S. Supreme Court ^{36/} and in subsequent Federal and State supreme court decisions; and with reference to evils in the milk industry in Oregon, recited in the preamble to the act, the court declared: "Whether it be in the milk industry, or any other business or calling, the power of regulation may only be put forth to correct some evil, or abuse found by the legislature to exist."

Second, the court held that the pooling and quota provisions of the act were not violative of the due process clause of the Fourteenth Amendment. Rational basis for these features, the court said, lay in the argument, conceivably true, "that the mere fixing of minimum prices does not suffice to accomplish the desired end of a stabilized market, for as long as the incentive remains to sell all the milk possible as fluid milk, the piling up of large surpluses will continue, the surplus burden will be 'unequally distributed,' and 'the pressure to market surplus milk in fluid form will be a serious disturbing factor.'" The court could see no constitutional difference between

^{35/} In the Oregon Supreme Court - In banc.; opinion by Justice Hall S. Lusk, June 6, 1939.

^{36/} The court quoted, as did the Federal court, from *Munn v. Illinois*, 94 U.S. 113, to show that "an industry, for adequate reason, is subject to control for the public good."

the fixing of minimum prices and the quota and pooling arrangement which was "designed to prevent one producer from gaining a disproportionately large share of the fluid milk trade at the expense of another," because both courses of action presuppose "an interference in some degree with the right to contract, with the traditional method of unrestrained competition."37/

In addition, the court held that the plaintiffs had failed to establish the burden of proof that their product, Grade A milk, was superior to that of Grade B producers, or that their investments in land, cattle, and equipment were in excess of investments of Grade B producers of like size and productive capacity; nor could they be dissociated from the problem of surplus, supplying as they did 40 percent of all milk sold in the Salem market. And on the score that the act conferred legislative power in violation of certain provisions of the Oregon Constitution, the court held otherwise; adequate standards or guides were provided in the statute, by which the board was to be governed and hedged about with definite restrictions. Several other contentions, less important in nature, were rejected by the board. And the court concluded that the law was "not unconstitutional in any of the particulars asserted," and that it had not been shown that the board had acted arbitrarily or in violation of the terms of Order No. 107. Accordingly, the decree of the circuit court was ordered affirmed. 38/

37/ The court cited, among others, the case of Milk Control Board v. Crescent Creamery, 14 N.E.(2d) 588, wherein the Indiana Supreme Court sustained a law similar to the Oregon act in its quota and pooling provisions, as well as in some other features.

38/ This opinion of the Oregon Supreme Court holds special interest for those interested in the legal aspects of milk stabilization, because of the great number of citations of State and Federal decisions.

April 1940.

